UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-15051, 09-10371

- - - - - - - - - - - - - - - - - - - - - -x

In the Matter of:

DREIER LLP,

Debtor.

- - - - - - - - - - - - - - - - - - - - - -x

In the Matter of:

MARC S. DREIER,

Debtor.

- - - - - - - - - - - - - - - - - - - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

February 2, 2010

10:24 AM

B E F O R E:

HON. STUART M. BERNSTEIN

U.S. BANKRUPTCY JUDGE

HEARING re Motion of Paul Gardi and AIM to lift the automatic stay (08-15051).

HEARING re Trustee's motion to approve settlement with GSO Capital Partners (08-15051).

HEARING re Status conference (09-10371).

HEARING re Chapter 7 Trustee's motion to approve settlement agreement with Sheila Gowan and GSO parties (09-10371).

Transcribed by: Penina Wolicki

A P P E A R A N C E S :

DIAMOND MCCARTHY LLP

Attorneys for Sheila M. Gowan, Dreier LLP trustee

The New York Times Building

620 Eighth Avenue, 39th Floor

New York, NY 10018

BY: HOWARD D. RESSLER, ESQ.

STEPHEN T. LODEN, ESQ.

LAMONICA HERBST & MANISCALCO LLP

Attorneys for Dreier trustee

3305 Jerusalem Avenue

Wantagh, NY 11793

BY: GARY E. HERBST, ESQ.

U.S. DEPARTMENT OF JUSTICE

United States Attorney's Office

86 Chambers Street

New York, NY 10007

BY: MATTHEW L. SCHWARTZ, AUSA

ALSTON & BIRD LLP
Attorneys for Gardi Parties
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309

BY: JOHN E. STEPHENSON JR., ESQ.

ALSTON & BIRD LLP
Attorneys for Gardi Parties
90 Park Avenue
New York, NY 10016

BY: ALEXANDER S. LORENZO, ESQ.
CRAIG CARPENITO, ESQ.

WHITE & CASE
Attorneys for GSO Capital Partners LP
1155 Avenue of the Americas
New York, NY 10036

BY: J. CHRISTOPHER SHORE, ESQ.
JULIA WINTERS, ESQ.

FRIEDMAN KAPLAN SEILER & ADELMAN LLP
Attorneys for Perella Weinberg Xerion Master Fund
1633 Broadway
New York, NY 10019

BY: ERIC CORNGOLD, ESQ.

KLESTADT & WINTERS, LLP
Attorneys for the creditors' committee
292 Madison Avenue
17th Floor
New York, NY 10017

BY: TRACY L. KLESTADT, ESQ.
SEAN C. SOUTHARD, ESQ.

CURTIS, MALLET-PREVOST, COLT & MOSLE, LLP
Attorneys for 360 Networks Estate
101 Park Avenue
New York, NY 10176

BY: T. BARRY KINGHAM, ESQ.

SULLIVAN & CROMWELL LLP
Attorneys for Eton Park objectors
125 Broad Street
New York, NY 10004

BY: BRUCE E. CLARK, ESQ.

MARK COHEN, ESQ.
Attorney for Fortress and Concordia

P R O C E E D I N G S

THE COURT: All right, we have a critical mass. Dreier. Go ahead.

MR. LODEN: Thank you, Your Honor. Steve Loden on behalf of the Chapter 11 trustee. We noted on the calendar outside that the Court has listed the Paul Gardi lift-stay motion first. We're fine with that motion being heard first if that's

THE COURT: Why don't we just -- it's intertwined with the settlement, and it's the same issues. So why don't you go ahead.

MR. LODEN: I'm sorry?

THE COURT: Go ahead.

MR. LODEN: With the?

THE COURT: You can start with the settlement.

MR. LODEN: Okay, Your Honor. Your Honor the settlement before you today is the product of stark choices that the Chapter 11 trustee faced in dealing with both the government and GSO. On the one hand, she could have chosen to essentially declare all-out war; war with the government to object to the forfeiture. That would be a must-win high stakes litigation, that would have been very costly and complex to pursue. She could have declared war on GSO and sued to recover the full 196 million that GSO received out of Dreier accounts. As discussed in the papers, there were slim facts on inquiry

notice plans against GSO, and GSO strenuously argued affirmative defenses to the trustee's claims.

THE COURT: What about the preference claims?

MR. LODEN: Your Honor, we -- as the trustee explains, the preference claims were stronger. However, there were risks with those claims as well. For example, the affirmative defense property of the estate. If GSO prevailed, the transfers from a Dreier LLP account to GSO were not transfers of an interest of the debtor in property; that finding would more than likely or perhaps apply to every other avoidance action that the trustee could bring. So the risks of litigating that and the unfavorable judgment that could result, was something that the trustee definitely considered.

On the other hand, instead of all-out war, the trustee could have pursued settlement, which obviously is what she did. Settlement with the government obtains the government's written agreement to not forfeit over twenty-five million dollars and other profits recovered from net winners. Settlement with the government results in 9.25 million paid to this Chapter 11 estate. And it's important to note that that payment is free and clear of Wachovia's cash collateral replacement lien.

Now, the trustee believes that the proposed settlements are reasonable, and in the best interest, but it's important to remember that the settlements are codependent. With no settlement agreement between GSO and the trustee, there

is no agreement between the government and the trustee.

THE COURT: What's the aggregate amount that's preference claims that you believe you have?

MR. LODEN: The estate holds -- I've got it in my notes, Your Honor, bear with me one second.

THE COURT: Aside from GSO?

MR. LODEN: Yes, Your Honor. Aside from GSO, there's approximately thirty-two million in preference claims.

THE COURT: Okay.

MR. LODEN: Your Honor, no, I apologize. My notes are incorrect. No, that's right, that's right. I had already backed out the GSO exposure for that number.

THE COURT: Okay.

MR. LODEN: So the agreements are interrelated. And the objecting parties want to say that they should be considered separately. But the fact is that if the GSO-trustee agreement is not approved, then the estate will lose more than just the 9.25 million that is to be paid in. The estate will lose the settlement art from the government's forfeiture . The estate will also lose the assurances that the government won't seek to forfeit twenty-five million dollars in net profits. And potentially, we could lose the entire case if the forfeiture is successful -- our objection is unsuccessful to the forfeiture, and the government forfeits all of Dreier LLP's assets as they've threatened to do.

Now, the trustee bears that risk. The trade creditors bear those risks. But the objecting parties have no risk at all. Regardless of what happens today, they are going to get their claims in the forfeiture. They will get their distribution of the 30.8 million that GSO is paying into the forfeiture, regardless of what happens today. So they really don't have a lot of skin in this fight, Your Honor. And their efforts to blow up these settlements, really benefits them to the detriment of all the trade creditors who will lose big if the settlement is not approved.

Now, the trustee's declaration explains her reasoning. And it was filed and served yesterday. And the trustee is available today to answer any questions that anyone might have. But in summary of the trustee's analysis, GSO was the biggest investor in Marc Dreier's Ponzi scheme. So the numbers are going to be larger. It's just the way it is. But the analysis of those claims against -- of the avoidance claims against GSO is the same as the analysis of avoidance claims against every other recipient of transfers.

Your Honor, I prepared a brief -- a one-page diagram of the transfers. May I approach? I have more copies if anyone else -- I've given one to the creditors' committee -- if anyone else would like a copy.

(Pause)

MR. LODEN: Your Honor, what this diagram shows --

well, before we get to the diagram, recall that during the last status conference I told the Court that we were looking to receive profits plus in resolving the avoidance actions. GSO invested 165 million dollars into the Marc Dreier Ponzi scheme. And they received back 196 million dollars. That's the biggest blue circle on this diagram. Of that 196 million dollars, 62 million, the green circle, was received within the preference period. The difference between the two, 134 million, was received outside the preference period.

To look at it differently, when the ninety-day preference window opened, GSO was still in the hole. GSO had been paid 134 million of its 165 million dollar investment. So within the ninety-day window, GSO reached the break-even point and received an additional 30.8 million dollars in profits from Dreier LLP accounts. So the profits -- as this diagram shows -- the profits are completely surrounded and subsumed in the preference exposure.

So let's talk about the 134 million outside the green circle, the remainder of the blue circle. None of that was profits. So GSO has a good-faith defense to avoidance actions, because the Ponzi presumption does not apply. The Ponzi presumption of fraud does not apply. And the trustee looked at that good-faith issue. And the question was, was GSO on inquiry notice of the frauds.

Now as she explai -- as the trustee explains in her

declaration, we did see red flags in the documents -- in the deal documents. For example, we saw that there were confidentiality provisions that prohibited GSO from speaking with anyone other than Marc Dreier about these transactions. We also saw that the Solow financials that had been provided by Marc Dreier were obvious fabrications. At the outset, they purported to be consolidated financials, but they didn't say what was being consolidated. Those financials also show that Solow had significant wealth, but raising the question: Why in the world are they borrowing at above market rates if they had access to liquid assets on their balance sheet?

Those documents also show that all cash -- all interest, all principal repayments, everything, happened through a Dreier LLP account. There was not one single payment from Solow -- obviously from Solow or any other non-Dreier LLP account. All of that was suspicious in our initial review of the GSO documents. And importantly, all of those facts apply with equal strength to the objecting parties, because those were characteristics of the deal that were common to every hedge fund investment.

So we dug into the GSO documents in further depth. We looked at the e-mail traffic between Marc Dreier and GSO. The trustee interviewed Marc Dreier on multiple occasions. We also reviewed the GSO binders, the documents that Marc Dreier kept, with respect to his dealings with GSO. And GSO itself made its

documents available for review. None of those reviews, in the trustee's opinion, turned up anything -- any more compelling facts than we had already known, that I've summarized to the Court today, with respect to the inquiry notice claims.

So then turning to the green circle, the sixty-two million. As the Court suggested by its comment earlier, the trustee believes the preference claims were much stronger than the inquiry notice claims. That is why, under the settlement, GSO is repaying 40.3 million dollars of that preference exposure. That's sixty-six percent -- just shy of sixty-six percent.

In the objecting parties' share in that entire recovery, they share in the 30.8 million that is being paid over to the forfeiture proceeding, and they will also share, if their claims are allowed, in the 9.5 million that is being repaid to this estate. Again, that's a sixty-six percent return. And we would suggest or submit that a sixty-six percent return on preference exposure, without a single shot being fired, is inherently reasonable.

But, and as noted on the diagram, the settlement is GSO returning its profits plus 9.5 million. So that is what our goal always was, profits-plus. And it's been satisfied with this settlement.

But the estate is not just getting the 9 -- or the bankruptcies are not just getting the 9.5 million that GSO is

paying back. We're also getting an assurance from the government that they will not interfere with 25 million in profits claims. We're also getting the settlement art. So when you add it all together, the 9.5, the 25-plus, and the settlement art, the bankruptcy estates are actually getting 34, 35 million dollars in consideration for these settlements.

So the objecting parties will share in 34, 35 million dollars to this estate, 30.8 million to the forfeiture --

THE COURT: Well, you haven't recovered the rest of the preference money quite yet.

MR. LODEN: Understood, Your Honor. Understood. But the ability to bring those claims unfettered by the government's threats is a significant win, given where we were nine months ago in this case.

So the objecting parties will share in over sixty-five million dollars in recoveries -- potential recoveries, claims and recoveries, as the Court notes, as a result of these settlements. Again, that is entirely reasonable, from our perspective, under any standard. And as the Court undoubtedly saw, Judge Rakoff indicated yesterday that at least with respect to the GSO-government agreement and the government-trustee agreement, he agrees.

Now, the objecting parties say it's unfair because GSO isn't a big enough net loser. To coin a phrase, they really want GSO to feel their pain. And the trustee is not deaf to

those equitable arguments. But the code's distribution scheme cannot be set aside because GSO didn't lose enough money. Just as creditors are treated equally under the code, holders of avoidable transfers are treated equally under the code. And the objecting parties collectively hold 20.5 million dollars in avoidable transfers, all preference exposure. That means that they were paid, while employees, landlords, court reporters and other trade creditors did not get paid.

THE COURT: But Mr. Gardi doesn't -- you don't have a preference claim against Mr. Gardi?

MR. LODEN: Mr. Gardi never got a single dollar from a Dreier LLP account, nor did he ever pay a dollar into a Dreier LLP account. But I'm talking about --

THE COURT: Well, one of his arguments is why should he be treated the same as those who invested in the Ponzi scheme.

MR. LODEN: I don't think he is -- I don't think he should be treated -- I don't think he is being treated the same, because he never put a dollar into the estate. He is being treated by this estate as --

THE COURT: Well, he --

MR. LODEN: -- a general unsecured creditor, just like the other countless claims that filed for malpractice.

THE COURT: I didn't mean it that way. I meant it in terms of the bar order that you're seeking.

MR. LODEN: Well, that gets to the automatic stay and property of the estate.

THE COURT: Well, it's also an issue on your settlement, because it's --

MR. LODEN: It is, Your Honor.

THE COURT: -- an element of the settlement.

MR. LODEN: It is, Your Honor. And I was just about to get to the bar order.

THE COURT: Okay. Go ahead.

MR. LODEN: I wanted to focus on the reasonability first. As I was saying, the objecting parties hold 20.5 million in preferences. That means that they were paid before landlords, employees, court reporters --

THE COURT: I interrupted you. Objecting parties, excluding Gardi, because he's filed an objection.

MR. LODEN: Correct, Your Honor. Correct, Your Honor. Correct, Your Honor.

So they're making equitable arguments, but what is equitable here depends on where you stand. I would submit that the trade creditors believe that the objecting parties, other than Gardi, are being treated inequitably in this.

THE COURT: What's the amount of the trade debt or the amount that's been filed?

MR. LODEN: The trade debt represents on aggregate approximately twenty-seven percent of the universe of claims

against this estate. The -- and I can put a dollar amount on that. About 170 million, thereabouts, Your Honor, if my math is correct.

Furthermore, talking about the equities here, Your Honor, we haven't done any due diligence other than looking at Marc Dreier's binders, any due diligence with respect to the other hedge fund objecting parties. So we don't know whether they have clean hands or not when they come into this Court. The point is, courts of equity cannot set aside federal bankruptcy statutes as easily as the objecting parties suggest, if ever. The trustee hears their pleas. And as we stated in their papers, we will work with them to reach a resolution. But their equitable arguments are no reason to upset the hard-fought settlements that are before the Court today.

Now, with respect to the bar order. The bar order protects GSO from the constructive trust tracing claims that net losers want to bring. And we've already seen Gardi explain why it believes it should be able to bring that claim.

THE COURT: Yeah, but Gardi's not a net loser. He's someone who had a settle -- he claims, that that is a settlement fund that belongs to him. You can debate whether it belongs to him or JANA at this point, but he's claiming --

MR. LODEN: If --

THE COURT: -- that. He's not -- he's in a different position.

MR. LODEN: He's -- that fact is different, but the argument he's making and the claims he wants to bring are the same. If you assume -- and we don't obviously -- but if you assume that Paul Gardi has an equitable right to amounts in Dreier LLP accounts, then his arguments, beyond that assumption, are the same as the net losers.

The purpose of the bar order is the same as the purpose of the automatic stay. It prevents a litigation free-for-all, and it channels all claims against estate assets through this Court. And those claims to recover avoidable transfers from Dreier LLP accounts are clearly within this Court's jurisdiction. That's what you held, Your Honor, in Keene, in Schick, and elsewhere.

And claims to recover those avoidable transfers, are one of this estate's largest assets. As we discussed earlier, profit claims, setting aside GSO, the estate holds an additional 32.2 million dollars in profits claims and 32 million dollars in preference claims. Without the bar order, the trustee would lose the ability to settle any of those claims -- or without a bar order as part of future settlements. If the Court doesn't approve the bar order, we would lose the ability to settle those claims.

THE COURT: Are there any limits on the type of bar order I could enter?

MR. LODEN: There are --

THE COURT: In other words, if GSO insisted on a bar order that said they get a complete release from everybody for everything, could I enter that kind of bar order, because it's necessary to the settlement?

MR. LODEN: We believe that if you can -- if there are unusual circumstances, to use the phrase in the Metromedia and Johns Manville case, if there are unique circumstances, that this Court does have that sort of related-to jurisdiction. But --

THE COURT: Even claims unrelated to the bankruptcy or to Dreier?

MR. LODEN: If the claims have no impact upon this estate whatsoever, I don't know how we would establish those unusual circumstances.

THE COURT: Well, GSO wouldn't be willing to do the deal unless you got that kind of a bar order. That's why I'm asking --

MR. LODEN: Understood, Your Honor --

THE COURT: -- is there a limit on what I can do?

MR. LODEN: -- understood, Your Honor. And GSO clearly made the bar order a necessary term of the deal.

THE COURT: Okay. So what are the limits on the type of claims that can be enjoined under a settlement agreement?

MR. LODEN: I'm sorry, you said so there --

THE COURT: What are the -- is there a limit --

MR. LODEN: Yes, Your Honor. For example, if one of the net losers believed that GSO owed a duty to that net loser, a tort duty, believes that GSO was somehow complaisant in Marc Dreier's frauds and actually fraudulently induced the net loser to enter into the Ponzi scheme transaction, I think we would have a very tough time arguing that this Court has jurisdiction to extinguish that sort of direct claim between a net loser and GSO.

THE COURT: Doesn't your bar order cover that kind of a claim, though?

MR. LODEN: I don't think it does, Your Honor. And there's a dispute about that. And GSO is present and can describe their analysis of what the bar order does. But from the estate's perspective, the bar order prevents third parties from suing GSO to recover the assets that the trustee has standing to recover. In other words, avoidable transfers. If you're a net loser and you hold derivative claims, derivative in the sense that you necessarily must claim through this estate in order to make your argument against GSO, the trustee's belief is that's what the bar order prevents.

THE COURT: But Gardi's contention -- I use Gardi because he's in a different situation --

MR. LODEN: Sure.

THE COURT: -- contends it's not property of the estate. You can't recover it. In fact, he's the only party

with standing to do it. Or maybe you both have standing.

MR. LODEN: Your Honor, the trustee has demonstrated that the account in this instance, in the Gardi instance, it's account 5966, was titled in Dreier LLP's name, and that it contained comingled funds. Thus, the presumption that the Court applied in Keene and Schick with respect to ownership of that property, applies. And it is presumed to be property of this estate.

THE COURT: But in Schick the defendant was unable to trace. Are you saying that Gardi should have the opportunity to trace?

MR. LODEN: Absolutely. And I was getting to that. The bar order prevents Gardi and other parties like Gardi from suing GSO to recover those assets. But what the bar order does not do is deny them the ability to make their constructive trust arguments or equitable tracing arguments. That's not what the bar order does. All it says is those arguments have to be made here in this Court, so this Court can determine whether or not the trustee holds both legal and equitable title in the 5966 account, or whether she just holds legal title, and equitable title sits in Gardi's hands, or someone else. So it's this Court's jurisdiction to make that constructive trust determination, not a state court or some other federal court sitting in another jurisdiction.

And the bar order does not prevent Gardi or anyone

else -- Perella Weinberg, Concordia, anyone, from coming into this court and making that argument. And it -- so it doesn't deny them a chance to be heard. It just gives the trustee the ability to: 1) control the recovery of assets of the estate; and ensure that she has the ability to settle with other net winners to benefit the entire estate.

So, Your Honor, in conclusion, the settlements have a lot of moving parts. There's no way around that. There's the GSO-government part, there's the trustee-government part, and there's the trustee-GSO part. If one of those parts fail, everything falls apart for this estate.

Now, the U.S. Trustee has not objected to this settlement, nor has the creditors' committee --

THE COURT: The government's a party to the settlement. They're going to object to their own settlement?

MR. LODEN: I'm sorry? Well, but the point is, and the point I'm making is, the U.S. Trustee and the creditors' committee, neither of whom have filed formal objections, are the only parties --

THE COURT: I'm saying the U.S. Trustee isn't going to object to the settlement. The U.S. Trustee's essentially a party to it.

MR. LODEN: What I'm trying -- what I'm saying, Your Honor, is the objecting parties don't have an interest at all in what happens to nonhedge fund creditors in this case. The

parties who do have an interest in those recoveries by those parties, the creditors' committee and the U.S. Trustee, have not objected to this, even though this settlement allows 30.8 million dollars to flow only to victims through the forfeiture, as opposed to trade creditors here.

Now, I understand that the creditors' committee did raise questions with GSO, and that they've had discussions, and they're going to address the resolution of those questions. But the point I'm making is, the parties who represent the trade creditors in this case have not voiced any opposition. It's just the hedge fund net losers who think GSO is not being forced to feel enough pain. That's why they're objecting to this.

THE COURT: How do we know who the releasees are under the settlement?

MR. LODEN: The GSO relea --

THE COURT: It's a very, very broadly described category of releasees. How do we -- how do I -- how does a hedge fund or whoever, know when they're suing somebody, whether or not they're in violation of the bar order?

MR. LODEN: Our understanding -- again GSO can clarify -- our understanding is that that release covers GSO affiliates who were involved in the investments in the Dreier Ponzi scheme.

THE COURT: Why can't you just name them?

MR. LODEN: We have no objection to naming them. None at all. If that's what it takes to make the bar order more appropriate, we have no objection to naming them at all, specifically.

Your Honor, in conclusion, the settlements are reasonable. We've gone through -- and again, the trustee is available to discuss her judgment. We also believe that the bar order is within this Court's jurisdiction, for the reasons discussed. So unless the Court has any questions, that concludes my presentation.

THE COURT: All right. Thank you.

MR. KLESTADT: Good morning, Your Honor. Tracy Klestadt for the creditors' committee. With Your Honor's permission, I will address the GSO settlement, and my partner, Mr. Southard, will address the Gardi settlement -- the Gardi matter.

Your Honor, the committee did not file an objection.. We had -- it was a very close call for the committee. We had prepared an objection but did not file it. We were concerned, Your Honor, about the information flow. While the trustee points out in her declaration that the committee was involved somewhat in the negotiations, that was actually earlier in the process. And when the settlement was announced, we actually were not involved at that time.

So we undertook an independent review of the trustee's

files as well as documents that were provided to us informally by GSO. We were concerned, Your Honor, as I said, that this was not above the lowest level of reasonableness. But through our negotiations with GSO, Your Honor, I'm pleased to report that GSO has agreed to waive its 502(h) claim as part of the settlement. And with that, Your Honor, we are prepared to state that we believe that the settlement is now above the lowest level of reasonableness, and are prepared to support the settlement. And I believe Mr. Shore will confirm that GSO will waive its 502(h) claim as part of the settlement.

THE COURT: Okay.

MR. SOUTHARD: Your Honor, Sean Southard, also for the committee, with respect to the Gardi lift-stay motion, to the extent we want to take that on at this point in time. It's the committee's view, much like that of the trustee, that Mr. Gardi and his entity have no standing here to argue in favor of lifting the stay. And --

THE COURT: Why not?

MR. SOUTHARD: -- and essentially usurp the estate's cause of action.

THE COURT: Well, he's saying it's not the estate's cause of action. He's saying that the funds -- he had equitable title to that 6.3 million dollars, and he has a right under nonbankruptcy law to trace it.

MR. SOUTHARD: Right. And we believe, as we set forth

in the papers, that in fact, Mr. Gardi never obtained an interest in those funds.

THE COURT: It may be JANA's -- it may be JANA that has the equitable interest.

MR. SOUTHARD: It may, in fact, be. But it does not appear to be Mr. Gardi, who is the movant here. He acknowledges in his papers that there was no meeting of the minds. In fact, it was apparently Mr. Dreier's intervening fraud, with respect to both sides, that resulted in JANA making the transfer into the estate account. And we don't see that under those circumstances, where there is, in fact, no meeting of the minds and no settlement, that Mr. Gardi obtained an interest that is superior to the estate's interest in those funds, once it hit the estate account.

THE COURT: Did you brief that issue?

MR. SOUTHARD: We did cite to both the -- both Schick I and Schick II --

THE COURT: I don't think those cases necessarily deal with that issue. Go.

MR. SOUTHARD: We believe that they do, and we also believe that it's clear under many cases, including Whiting Pools and others, that once there's a prima facie case made out under Chapter 5 to avoid transfer, which Schick certainly supports, that there is an estate property interest in that cause of action; and that what Mr. Gardi is essentially trying

to do through a lift-stay motion as opposed to, perhaps more properly, and adversary proceeding seeking to determine the interest in that property, he is seeking to lift the stay and say this is not their property, it's ours, and therefore we should be able to go out and sue.

What we're saying is there's a prima facie cause of action here which is, in part, being settled at this point, by the trustee. And he's trying to take that property of the estate interest away. That's essentially our position on it, Your Honor.

THE COURT: I'll hear from the objecting -- sorry, why don't I hear from the Chapter 7 trustee. Go ahead.

MR. HERBST: Your Honor, I'll be very brief. I think Mr. Loden covered very well the rationale on the global number. Our number is much more modest in comparison to this overall settlement. We're getting 250,000 into the Dreier estate. We're essentially granting a release of claims. I've laid out in the response papers and the motion, I think, clearly as to why our claims would be a lot more difficult to pursue. Number one, we don't have a preference claim, because the transfers to GSO were outside the preference statute, assuming that the property in the 5966 account were ultimately to be determined to be property that the Dreier trustee would have, versus the Dreier LLP trustee. And the account was designated as a Dreier LLP account.

We've read your Schick case. We think that if it would be creating certain hurdles that we would have to overcome, it would by necessity require a litigation between the two trustees as to who should be distributing the money; and then by necessity would require a litigation with the government and also with GSO. This resolution -- and I think Ms. Gowan put it correctly -- was quite contentious in the late hours to finish off the settlement. We reached a number we thought was appropriate for this estate. We would have difficult claims. We think that the best claims would lie in the Dreier LLC estate. But we weren't going to give a release for nothing. So we negotiated the 250,000 dollar sum. And I think the settlement, from our perspective, clearly rises above the lowest rung of reasonableness, given the issues that would be raised in defense of our claims.

Second issue was essentially raised with respect to the bar order. I know that's been addressed. The only distinction raised was whether Your Honor can enter a bar order in a Chapter 7 versus Chapter 11. I believe the case law is clear that you can do that if it meets the requirements of unique circumstances, which this case, I think, abundantly does, and satisfies those requirements of being unique and extraordinary.

And it is a component part of any settlement, unlike the cases where the Court found that the release -- a bar order

would be appropriate, but did not grant the bar order because it was the trustee agreeing to use his best efforts. In this case, it's not a best efforts issue, it's a requirement component of the settlement. And therefore, if there is no bar order, there is no settlement. And therefore, under those circumstance, we believe that Your Honor has the power and the authority. And the issue that Your Honor has to deal with, with the question, is with the scope of the bar order.

THE COURT: Thank you.

MR. HERBST: Thank you.

MR. CLARK: Good morning, Your Honor.

THE COURT: Good morning.

MR. CLARK: Bruce Clark for the Eton Park objectors. Your Honor, I'd like to start with the actual words describing the bar order, because there's obviously some misunderstanding or misapprehension as to what's in there. The mechanism for the bar order would be developed through the order that's going to be presented to you, as was attached to the papers. And basically that says that "All creditors, parties-in-interest, and any entity or person that files a proof of claim, shall be enjoined from commencing all causes of action as defined in the GSO agreement, against the GSO releasees, as defined in that agreement, and relating to Dreier LLP and the note-fraud funds as defined in the agreement."

So you have to go to the agreement to get the full

flavor of what is being agreed to. And what that says is as follows: "There will be an injunction entered enjoining any and all creditors, parties-in-interest, and any entity or person that files a proof of claim in the Chapter 11 case or the Chapter 7 case, from commencing or continuing any and all past, present or future claims or causes of action, including any suit, petition, demand, or other claim in law, equity or arbitration, and from any and all allegations of liability or damages, including any allegations of duties, debts, reckonings, contracts, controversies, agreements, promises, damages, responsibilities, covenants or accounts, of whatever kind, nature or description; direct, indirect, in law, equity or arbitration, absolute, contingent, in tort, contract, statutory liability or otherwise; based on strict liability, negligence, gross negligence, fraud, breach of fiduciary duty or otherwise; including attorneys' fees, costs or disbursements, that's defined as claims or causes of action against the GSO parties, their affiliates, directors, officers, employees, representatives and agents, in respect of past or present, direct or indirect stockholders, affiliates, limited partners, investors or other equity holders in any entity controlled or managed by any GSO party," everybody who's come before, "and each of their successors, assignees, and transferees, and each of their respective past or present officers, directors, employees, agents, legal representatives,

privies, representatives, accountants, attorneys, any party subject to an indemnity relating to Marc Dreier, Dreier LLP and the note-fraud funds, by a GSO party, owed to the GSO releasees, relating to Mark Dreier, Dreier LLP, and the note-fraud funds; and releasing and forever discharging all GSO releasees from any and all claims and causes of action, known or unknown, that are, have been, could have been or might in the future be asserted, against any of the GSO releasees relating to Marc Dreier, Dreier LLP, and the note-fraud funds."

Now, I don't believe that language can be accurately characterized, consistent with the way counsel for the Chapter 11 trustee just described it. That's not what the words say. It's simply too broad, and especially, under the case law in the Second Circuit. In Metromedia, the Second Circuit laid out the rule that in bankruptcy cases, "The Court can enjoin a creditor only when the injunction plays an important part in the plan." And I'll get back to the plan in second. "A release of this sort is proper only in rare cases." The specific language that Metromedia criticized was that the release there released actions whether for tort, fraud, contract, violations of federal or state securities laws or otherwise, whether known or unknown, foreseen or unforeseen, liquidated or unliquidated, and so forth.

It's the same language that's in the settlement agreement that you are being asked to approve today.

THE COURT: Could the bar order simply enjoin all claims relating to any transfers by Dreier or Dreier LLP to GSO?

MR. CLARK: I think that would be more defensible.

THE COURT: So what's really the difference between that and this? What other claims could there be?

MR. CLARK: Whatever claims any party-in-interest would have against GSO related to Dreier. And that's part of the problem. You don't know what they are, and I don't know what they are. And that's has been criticized in the cases. It was criticized in Metromedia, and then again in the Travelers appeal. And, you know, you're just being asked to approve something that's sort of a shot in the dark. And it's not that there couldn't be an order of some sort devised that might be appropriate, but --

THE COURT: So what do you think that is?

MR. CLARK: Well, I'm not going to draft it for the trustee and GSO. I think -- you know what I think it should be, Your Honor? It should be in a plan. And the difference here --

THE COURT: What about the Chapter 7 case? There is no plan in a Chapter 7 case.

MR. CLARK: I think the Chapter 11 case is our real problem here. I understand the difference. The reason --

THE COURT: So you're saying there couldn't be a bar

order in a sale order?

MR. CLARK: I think -- well, a bar order of this magnitude? If it's related simply to the assets that are being sold, possibly. But you could certainly tailor it a lot better than this has been tailored, even in that situation.

And the reason I mention a plan is that for one thing, Metromedia dealt with a plan. And it didn't say we only mean a plan, we don't mean any other instance. But it was pretty clear that it was only going to approve that kind of a bar order in the context of a plan. And the reason I think that makes a difference is because when you're dealing with a plan, you're dealing with disclosure requirements that are very comprehensive. And we don't have that here. It hadn't happened here. Until we made a fuss about it, we didn't get the trustee's declaration until yesterday, saying at least what she did in the last six months and how this evolved.

The numbers that came out this morning about what the preference claims are and that sort of thing, the last filings, the statement of financial affairs a year ago and the other materials that have been filed, they don't reveal anything like a twenty million dollar preference claim against the objectors. The number that's revealed in the statement of financial affairs and the list of people who got paid within ninety days is about four million. Now, it could be that that things have developed since then --

THE COURT: But how can that be, if GSO got sixty-five million?

MR. CLARK: They got sixty -- I think it's sixty-two, actually.

THE COURT: So how can the statement of financial affairs say only four million?

MR. CLARK: For the objectors.

THE COURT: Oh.

MR. CLARK: GSO is not objecting. I mean, some of the other numbers that came out today about what claims are here, someone else apparently got profit of thirty-odd million. That's news. I haven't seen that in any of the filings up to now. So the existence of comprehensive, more specific and more accurate information is something you would presumably have in a plan, and not here. And the other aspect of that is you know how people are going to be treated, people who are similarly situated, other victims like my client, for example.

The problem with this, or one of the problems with this is that it's simply encouraging litigation against the people who lost the most money. It guarantees that they're going to lose more even if it's just through costs. And it puts them in an inferior position to GSO, who's getting out with ninety-four percent of what it invested.

Now, the trustee can't give us that deal, because to give us -- I'll give up my profits, because I had none. It's

not a great concession. But to put my client in a position where they would have ninety-four percent of what they invested, the trustee would have to pay me seventy million dollars.

THE COURT: But the bankruptcy's not going to do that, and the trustee has an obligation to bring preference claims.

MR. CLARK: Well, not always.

THE COURT: And if you got paid within ninety days on an antecedent debt, you're going to be a preference defendant. That's just the way the law's written.

MR. CLARK: Well, that -- the statute says that the trustee is authorized to do that. It doesn't say the trustee must. And there are circumstances in some cases -- I admit they're limited -- where in fact, a court in your situation has decided not to do that. There's a district court case, Your Honor, in Arizona, American Continental against All Preference Defendants, 142 B.R. 894. It was a Ponzi scheme case. And the Court said these defendants or potential defendants, they've lost enough. I'm not going to authorize this. I'm not going to permit it. And especially here, I think it's something that you are entitled to ponder.

THE COURT: Fair enough. But can't you raise that as a defense when, as and if the trustee sues you?

MR. CLARK: Well, this is more a general problem. It would be a problem for my client if they got sued, and we could

raise that as a defense then. But I think if you look at the entire estate and the practical effect of what's going on here, you might pause for a minute before you authorize this.

Here are the numbers; here's the way it works. This sixty-two million dollar preference claim against GSO is probably the largest claim that the estate has. As far as I know, the objectors have preference claims that are much, much smaller than that. The thirty million dollars that is going to be forfeited, is being treated as though this is a new transfer of some sort, a new give-up, by GSO. That money was forfeited subject to forfeiture and over in the forfeiture bailiwick quite some time ago. They're just going to keep it. It's not as though there's new money going over.

THE COURT: Who's going to keep it?

MR. CLARK: The U.S. Attorney's Office and the --

THE COURT: Isn't it going to be distributed to the clients and the other victims?

MR. CLARK: Among others, that's true.

THE COURT: All right.

MR. CLARK: But it's already there. It's already there. What's left at issue, even if you think you should back out the thirty million, is another thirty million. And they're paying 9.25. Now, we can't know at this stage what any of the other losers, the people who lost the most in this case, are going to get. And I think it's relevant whether or not our

people are treated differently at the end of the day, when in terms of conduct, in terms of other things, they are in fact the same as GSO.

Moreover, we have -- I'm just talking about the objectors that we identified in our papers. We have something like sixty-four percent of the claims that are in the claims register. The Perella people have another eight percent. They were not included in our chart. And the creditors, who are on the target list -- there was an Exhibit number 2 to the government's application that you saw, of course, in the hearing over in Judge Rakoff's courtroom -- there were eighty-two targets there. And if you add up the claims they have put in, this entire group of potential targets has 82.4 percent of the claims in this case.

Now, where does that put us? We haven't had a fee application that I know of, that the docket discloses, since July. If you'll read the trustee's report of yesterday, there's been a lot of work done. In fact, when I read that, I said -- I went back to the title, trying to see if this was a fee application or what. There will be a big application for that, and presumably the creditors' committee will want some compensation. And I'm not saying they're not entitled to it. But that's where a good chunk of this 9.25 is going to go. And if there are eighty-two targets of these avoidance actions, that's where almost all of that money could go.

I know Your Honor looks at these things and will probably keep control of it. But it's going to be a very expensive process. Anyway, so at the end of the day --

THE COURT: So what are you proposing, they just shut down the estate now?

MR. CLARK: I'm proposing that you not approve this settlement until you get the information that you would be entitled to.

THE COURT: What more information do I need?

MR. CLARK: I think you need to know exactly what are the claims, what are the avoidance claims that they intend to pursue, and what amounts -- you don't have that. The numbers you were given this morning are not the same as what is on the claims register or on the ninety-day list. And I think you also need to know what the amounts would be paid from the other victims here, if they were going to be treated similarly to GSO, so you could see whether or not you're really dealing with an effective plan of recovery and distribution.

I suspect you're not, because at the end of the day, if I'm right in my numbers, based on the information that's been filed, if the targets have got eighty-two-plus percent of the claims in this case, you're just circling money. The only thing that's going to --

THE COURT: But isn't that the purpose of preferences? You bring back the money that's paid within ninety days, and

then you distribute it equitably to everybody.

MR. CLARK: I can't disagree with that. In the abstract.

THE COURT: That's --

MR. CLARK: That's what the statute says.

THE COURT: -- and if I extended your logic, you would argue that a vendor who lost a lot of money and happened to get paid within ninety days, shouldn't be forced to give it back, because he's lost more money than everybody else.

MR. CLARK: I think there are two differences here. First of all, there are others who are situated so similarly to the person whose settlement you're being asked to approve. That's one thing. And the other is, there's no information about how those people are going to be treated and what's going to come out in their --

THE COURT: When you say how they're going to be treated, do you mean whether the trustee is going to sue them or how they're going to be classified under a possible plan?

MR. CLARK: I think at the end of the day, how much more they will have to pay or under what format, in the trustee's plans. I mean, this is the largest preference claim you've got.

THE COURT: But can't you tell that just by looking at your books and records, figuring out what you received within ninety days from Dreier LLP, or in the unlikely event, the

Dreier estate? That's what you're exposure is, presumably.

MR. CLARK: Well, you know what the risk is. But you don't know -- you've got eighty-two percent of the people who are in this room being represented as creditors are targets of this. There comes a point, and I think eighty-two percent probably passes it, where we're just running in circles.

I mean, maybe the most effective thing to do here is to put together a proposal that would embrace all of these objectors and treat everybody the same, and get out of this without spending the nine million dollars on litigation fees.

And the other point, going back to the main point and the first point is, the bar order that's in here simply cannot be approved as it's written, under Manville and Metromedia. It is precisely this kind of bar order that they prohibited, even in a plan, let alone here where you don't have the same information. And that's really -- those two things are really the essence of our point.

THE COURT: Okay. Thank you.

MR. CORNGOLD: Good morning, Your Honor. I'm Eric Corngold from Friedman Kaplan for Perella Weinberg Xerion Master Fund.

I'm not going to repeat the arguments that you just heard. I think it's clear that the release is too broad as it's written and has to be rewritten under the Second Circuit law. I just want to make a point about Metromedia and the

state of the law in the Second Circuit after Metromedia. I mean, of course, in the Ninth or Tenth Circuit, these releases just couldn't even be an issue, they're not permitted. Not --

THE COURT: We're not there.

MR. CORNGOLD: -- not our circuit. What Metromedia --

THE COURT: Although California might be very nice this time of year.

MR. CORNGOLD: -- it's -- you know, it's rainy. It's always rainy in California.

What Metromedia does, and the logic of Metromedia, is say that a release has to be necessary to a plan, not necessary to a settlement. The trustee --

THE COURT: So it doesn't apply at all to this case, then?

MR. CORNGOLD: --it doesn't apply -- no, no, no. The logic of Metromedia is that with a plan, you know where everybody stands, and so releases make sense when you know where everybody stands. The releases just don't make sense, and the logic of Metromedia I think is strong, that releases don't make sense in a first-in case -- in a first-in settlement that's necessary for that settlement --

THE COURT: Can I ask you a question? Could the trustee commence a litigation and settle that litigation or release the party that its litigating with, under the settlement?

MR. CORNGOLD: With the trustee, certainly. The trustee can -- but for the trustee --

THE COURT: So this is just expanding the scope of the release, isn't it?

MR. CORNGOLD: It's releasing claims that third parties might have against other third parties. And the code doesn't permit that. And that's what Metromedia says, the code doesn't permit that in the context of where it's not unique and where it's not necessary for a plan. It --

THE COURT: So you're saying there can be no releases in sale orders, for example?

MR. CORNGOLD: If the -- you know, I think the logic of Metromedia with respect to sale orders has to be sort of where in the chronology they take place. If we're talking about at the end of a process where the parties or the bulk of the parties know where they stand -- and that's really what I think we've all been hitting at -- then it makes -- then releases may make sense. And that's when the exceptional use of releases that Metromedia says may be permitted, make sense. But at the beginning of the day --

THE COURT: Well, let me stop you. We get many sales in this Court within the first sixty days of a Chapter 11 case. Are you saying that those sale orders can't contain releases?

MR. CORNGOLD: No, they can contain releases. But if they contain releases that have the breadth that these releases

have, stopping third parties from going after the other parties, I think Metromedia and the Second Circuit don't want that to happen.

The only other point I think I would make is, the argument that the trustee is making about permanent releases, using stay -- the automatic stay as an analogy are just -- it's conflating two very different concepts. Of course, the automatic stay is in place. But that doesn't mean -- and what Metromedia tells you, and what the Second Circuit tells you, is that doesn't mean that the permanent releases that bar for life third-party claims against other third party claims, should be permitted. And that's, I think, the problem besides the breadth of this bar that we face here.

THE COURT: Thank you.

MR. COHEN: Your Honor, Mark Cohen for Fortress and Concordia. I simply join in Mr. Clark's comments, in particular his comments about the scope of the -- breadth of the release. And not to redo it, but the way affiliates are defined, that picks up Blackstone, which is a public company, and every indirect and direct shareholder of Blackstone. So that if you trace through the release as drafted now, it's very broad and goes beyond Metromedia and the other cases. And I won't repeat the arguments Mr. Clark has made. Thank you

THE COURT: Anybody else want to be heard in opposition to the settlement?

MR. STEPHENSON: Your Honor, John E. Stephenson with Alston & Bird on behalf of Paul Gardi. May I speak from here, Judge --

THE COURT: Sure.

MR. STEPHENSON: It's metaphorical, I think, that I'm sort of over here behind the bar and everybody else is up there, because we aren't like anybody else --

THE COURT: More of an allegory, I think. Go ahead.

MR. STEPHENSON: Because we aren't like everybody else, and I appreciate the questions that the Court directed to the movants with respect to the distinctions that my client has with regard to everyone else. I would echo what's been argued. In our opposition papers there are a number of common positions that we take with the objectors from whom you already heard, principally that there's no subject matter jurisdiction or Johns Manville for the bar order that they proposed, that even if a form of bar order were permissible, the bar order that Mr. Clark appropriately spent the time going through, I'd underscore something that I would say more shortly, if you'll forgive me and indulge me for colloquialism, I was born and raised in the rural south and --

THE COURT: I thought you were from Brooklyn.

MR. STEPHENSON: -- that release, Your Honor, is what Baptist preachers call in the south, broad as the power of salvation. You could not conceive of a release more broadly

drafted. So in favor of the releasors, you can't do better. But if you are those who had claims that would be barred, you couldn't do worse. And that's what I'm really here to talk about, Your Honor, and those are --

THE COURT: Let me ask you a question. Suppose the trustee sues GSO, hits a home run and recovers the whatever it is -- thirty-million, let's assume -- what's left. Could you still bring a tracing claim against GSO?

MR. STEPHENSON: Against GSO directly?

THE COURT: Yes.

MR. STEPHENSON: If all the money had already been paid, my -- here's the problem, here's the problem. I have a claim that is in conflict with, it competes with the claim that the trustee presumes to settle in this settlement, which has all of the problems that everyone has already identified and I won't belabor. But we don't know anything about the level and nature of the due diligence, except for Ms. Gowan's declaration that they kindly served at some point late yesterday. We don't know anything about the nature or the scope of all the parties who may be released, which again, goes far broader than is necessary. And we can't contemplate who all that they may be. And so the settlement that she undertakes is so much broader than is necessary, and we know so little about the nature of her investigation and due diligence, that that creates that problem.

But fundamentally, these aren't her claims to compromise. And that is my point. I have in common with the other objectors all the positions that they've argued. And those defects are fatal to the proposed settlement, I respectfully submit. But I have, beyond that, the fundamental proposition that the trustee presumes, without any evidence, without any real effort to present legal argument, and certainly with no hearing where the Court or a court of competent jurisdiction could adjudicate claims, determines whether they own the claims they intend to settle.

THE COURT: Well, they have legal title to the funds that were transferred, don't they?

MR. STEPHENSON: Maybe they do. And I'm not going to -- I'm not going to quibble with that. But I would submit to you, as the Chapter 7 trustee has raised and others have identified in earlier pleadings, it's not altogether clear that Dreier LLP owns 5966, that account, the account through which all the fraudulent funds --

THE COURT: Who do you think owns it?

MR. STEPHENSON: Marc Dreier individually controlled that account. Marc Dreier directed all of the transactions in that account. And as far as I know, because we don't have any evidence, because we haven't been able to take any discovery about it, all of the money that went into that account is the result of --

THE COURT: Well, wait a minute. When was this motion filed?

MR. STEPHENSON: Pardon me, which motion?

THE COURT: The present motion. You've had ample time to take discovery.

MR. STEPHENSON: Our motion to lift stay?

THE COURT: The motion to approve the settlement. They've raised the same issues.

MR. STEPHENSON: January 8th, Your Honor.

THE COURT: All right. Did you try and take any discovery since January 8th?

MR. STEPHENSON: We did not, Your Honor.

THE COURT: All right.

MR. STEPHENSON: We did not. But I'm not here to argue about the legal title issue, only that there hasn't been any evidence other than the Dreier LLP name is on the account to determine whether they have legal title in fact. But that's to the side. There is no --

THE COURT: But how does that make a difference if the Chapter 7 trustee, who would be the only other party to assert that right, supports the settlement also?

MR. STEPHENSON: And it doesn't, I think, in the circumstances of this proposed settlement, which why I'm not -- I'm not here to quibble about the proposition of legal title. But what is not in dispute, Your Honor, is that the Dreier LLP

estate has zero equitable title to those funds. Those funds indisputably came from a thief. That thief, as Your Honor has noted in your own opinions, can't transfer legal record for title. And there is no doubt that the Chapter 11 estate has no equitable title to those funds.

THE COURT: Well, but you know, there's a lot of law on Ponzi scheme cases which say that if the account is comingled, you don't trace all those who are similarly situated, basically are unsecured creditors with respect to that account.

MR. STEPHENSON: Which, as Your Honor knows, it's our position, we are not. We are not Ponzi scheme victims. We are not one of those who are similarly situated. We were in a unique position vis-a-vis Marc Dreier. He was my client's lawyer. He was owed a fiduciary duty. He never voluntarily transferred any funds --

THE COURT: Has your client ratified that settlement with JANA?

MR. STEPHENSON: Pardon?

THE COURT: Has your client ratified the settlement?

MR. STEPHENSON: No. And, Your Honor, here's the thing about --

THE COURT: So isn't it JANA -- doesn't JANA have a greater interest than your client in those funds?

MR. STEPHENSON: We will only know when that issue is

determined by a court of competent jurisdiction, which is why we've moved to lift the stay.

Here's the point. The facts about that are ultimately not in dispute, but the legal interpretation of those facts will very much be in dispute. We know that JANA takes the position that the risk of loss with respect to the transfer of the 6.3 million dollars is with my client. They take that position because they say, we dealt with your lawyer who had actual or apparent authority.

It's ironic that the creditors' committee tries to argue that we have no claim or standing to the 6.3 million, while arguing in their papers that Marc Dreier had actual and apparent authority to act on our behalf. They actually have it exactly wrong. Under New York law, the issue of whether that settlement is binding on my client turns on the question of whether Marc Dreier had actual or apparent authority to enter into it at the time that he did.

And under New York law, it's also without dispute that that is an intensive fact and circumstance investigation. We need that issue to be resolved. We need that issue to be resolved because if we, in that litigation, a court of competent jurisdiction determines that Marc Dreier was -- did not have apparent authority, then JANA has the risk of loss. And JANA is the claimant to the 6.3. But by the same token, we have a 6.3 million dollar claim against JANA. So that is one

way that that can be resolved.

Alternatively, owing to facts and the circumstances, a court of competent jurisdiction could determine that Marc Dreier did have apparent or actual authority to bind my client to a settlement, in which case, without any doubt, we're the beneficial owner of the 6.3 million. And you cannot blithely blow by that legal and factual determination, which is precisely what the settlement, as proposed, would do.

And what we say, Judge, is a court of competent jurisdiction must hear the facts. They must consider the law and they must decide if Paul Gardi or the Gardi parties, is the beneficial owner of the 6.3 million. Then we reach the question of can we trace.

And all we have, with all respect to the Chapter 11 trustee, is the broad characterization that oh, my gosh, these funds are hopelessly comingled. Well, they're not. They're not as it relates to our money. And the chart that we submitted to Your Honor in connection with our moving papers, traces simply, in two steps, exactly where the money is. On day one there's 41,000 dollars. Our 6.3 or the 6.3 that is at issue here, the 6.3 million dollars that the estate has no claim to, equitably anyway, that 6.3 goes in and then there are transfers out. And we can see exactly where they went.

And because it compounds the problem with the proposed settlement, we know that substantially all of that money went

to GSO parties, broadly defined. And so we believe we may be determined to be the equitable beneficial owner of those funds, with standing to pursue it directly. The funds are in fact traceable. We traced them to the parties that would enjoy the broad bar under the proposed settlement. And we would be precluded from recovering those monies. And that is as profoundly an inequitable result as could possibly be fashioned against my client.

And at the end of the day, we need these issues resolved -- and I know Your Honor shares precisely this interest -- in the legally correct way, with the proper procedure and own evidence. And right now, we have none. And the reason that we move to lift stay -- there's some quibbling about whether that's procedurally appropriate or not. Should we have filed an adversary proceeding, because we are fundamentally challenging whether an asset belongs to the estate or not? And that's true. That's true. But our problem, Your Honor, is we are unsure of this Court's subject-matter jurisdiction to adjudicate that claim.

Now, I'm not suggesting that that claim is not a core claim over which the Court could exercise jurisdiction, that is if it is an asset of the estate. But we have a stakeholder in that proposition who is not before this Court. JANA has filed no proof of claim. They made that strategic -- what I can only imagine was a strategic decision to take the position that they

settled with Paul Gardi by dealing with his lawyer, who they claim had apparent authority, and when they wired the money at his instruction, the risk of loss transferred from them to the Gardi parties.

So we filed our proof of claim, which is contingent, on its face, on the outcome of the legal analysis of whether we're the beneficial owner or JANA is the beneficial owner. But JANA is a necessary party to the adjudication of that question. If this Court can exercise subject-matter jurisdiction over JANA on that proposition, we are more than happy to proceed before Your Honor, and I see the efficiencies in doing so. And we're prepared to do that -- to have you hear the evidence and make the decision about whether the Gardi parties are the beneficial owners of the 6.3 million or JANA is the beneficial owner of the 6.3 million.

But a court of competent jurisdiction has to do that. I am uncertain about the Court's subject-matter jurisdiction. JANA, I would expect, would object to it. They didn't file a proof of claim. They haven't appeared here. And while there's personal jurisdiction over them, they may take the position there's no subject-matter jurisdiction on that question, or they may demand a jury trial. And those are things we don't know.

I simply want to get that issue joined. I want to get it joined immediately. I want to take discovery on it as

expeditiously as possible. And I want this Court or a court of competent jurisdiction, be it the district court or the supreme court in Manhattan, to deliver an opinion, binding on all the parties, collateral estoppel to everyone, so that there's no piecemeal litigation, so that we're not at risk of being whipsawed by receiving a judgment in one proceeding that we are not the beneficial owner, and then a judgment in a separate proceeding against JANA, that Dreier was authorized to settle, and therefore we're barred in our claim against them.

The only way to efficiently resolve that issue, fully and finally, with relief to all parties and with an absolute bar in front of the litigation over it, is for a court of competent jurisdiction to hear the question of whether Paul Gardi is the beneficial owner of the 6.3 million dollars. And that is what we seek in our motion to lift the stay. And that is what we would plainly be barred from doing if the GSO settlement is approved.

And one other thing. There's been a lot of talk about channeling. We're going to channel the money, and you can fight over that pot. Well, as I understand the channeling proposition, my pot went from sixty-two million dollars of preference claims that are out there, and the 6.3 million of my client's money that is in the hands of the GSO parties. That was my pot to begin with. And because the trustee has undertaken to compromise and settle that claim, we say, without

authority, as it relates to the 6.3 million, my pot is now 9.25 million dollars.

THE COURT: But you only have a 6.3 million dollar claim.

MR. STEPHENSON: Well, but am I ratably -- am I limited? Am I limited to 9.25 as a percentage of the 62 million that was recovered. That's less than one-sixth. And so that I'm from 6.3 down to a million dollars in my claim. Or if I'm right, do I get the first 6.3 million of the 9.25? We don't know. You know why we don't know? There's no plan. There's no plan. We don't have any idea -- and as Mr. Clark said and as others have said, this agreement on a standalone basis is a one-off, a shot in the dark. We don't know how it fits into the broader scheme.

And in order to make a truly informed decision about what's equitable and what's right, on all of the facts and the circumstances, the Court needs all the evidence. The Court needs to sift through the interests of all the parties. And the Court needs to understand how one thing affects another.

THE COURT: What more evidence or what factual disputes are there that I would have to resolve in order to know whether I could approve this settlement or not approve it?

MR. STEPHENSON: Well, respectfully, I think Your Honor has to decide the question of whether my client is the beneficial owner of the 6.3 million dollars and whether the

trustee is even authorized to compromise and settle that claim. And the Court would need to consider, before it entered a bar order as broad as the one presently proposed, whether under all the facts and the circumstances, that is an appropriate -- whether these are the unusual circumstance contemplated by Metromedia where it is both essential to get the settlement done, that is GSO is requiring --

THE COURT: But GSO says it will not do the deal without that provision --

MR. STEPHENSON: Fine.

THE COURT: -- so do I need any more facts to decide that particular issue?

MR. STEPHENSON: Well, if they won't settle, then the motion, I assume, would be withdrawn if Your Honor said I am not approving --

THE COURT: Okay. But on the issue of whether or not it's critical to the settlement, do I need to take any evidence on that?

MR. STEPHENSON: If they say that it is, then we can only assume that that's what they'd say under oath if cross examined. And so maybe it is. The problem though, and everyone here acknowledges it, we are having a one-off settlement without any context or understanding of a broader plan, that is compromising, I submit, on meager terms, but you know, we could quarrel about that -- is compromising what

everyone says is the largest single claim of this estate, sixty-two million dollars. And if I understood the movants, sixty-three million dollars out of ninety-million that's out there. I think they said there was another thirty million dollars in preference claims.

Why on earth would we decide right out of the gate to settle the largest claim of the estate so that we can pursue the smaller claims of the estate? If the strategy is let's pursue preference actions to maximize recovery for the estate, why doesn't it apply to the first sixty-two million? Why do we settle the biggest claims to fund going after the smaller claims? If I were a reasonable and logical man --

THE COURT: Well, maybe GSO was the first to come up to the plate?

MR. STEPHENSON: Boy that -- they are getting one heck of a first-mover discount. And maybe some of that is important, but I will tell you, that I represent clients in a lot of contexts, Judge, with multiple defendants. And it is usually my strategy, being economically rational, to settle with the smallest claims to fund my litigation against the bigger claims. Because if I've got to win the same legal issue, I want to win it against the sixty-two million. I don't want to win it against five people or ten people or twenty people, who in the aggregate hold thirty million. The economically reasonable, rational person wouldn't take that

strategy.

So I don't know, because I'm not privy to these discussions. But I understand from what's been filed and what's been argued here today that the defenses on GSO are common to the other parties. I also heard, and I know Your Honor did too, that there were lots of red flags. I will tell you, as someone who represents a party against whom no preference or avoidance actions could be brought, because we received no money, because we were not a party to the Ponzi scheme, unlike all of these other claimants, I'm very interested in how red those flags were. I'm very interested in what it implies about actual notes or inquiry notes. I'm very interested in how we might develop the facts that creates a risk, just a qualm of risk.

THE COURT: So why didn't you take any discovery?

MR. STEPHENSON: Well, we got -- we got this motion on -- we got the proposed settlement on January the 8th. And this hearing is set at or about that time for February the 2nd. We had those thirty days. We have to file all the motions that we need here before Your Honor --

THE COURT: You could have sought an adjournment. You could have sought to take expedited discovery.

MR. STEPHENSON: Fair enough. Fair enough. I could have. That's something I could have done. I thought that that would not be very moving on Your Honor unless you heard the

arguments that we are making that we presented in our papers, and that I was able to speak to you about why considering those options makes sense.

And you asked me, fundamentally, what do we want to know about the settlement in order to approve it, and what I am saying fundamentally is, we have no idea how it fits into a broader plan. And the only stated strategy is: I was afraid of the risk of litigating with the holder of at least sixty-two million, and I know I had evidence -- I had evidence that I might be able to go after the whole of the money. And again, I will tell you, from representing clients in similar circumstances, where you can create in an entity like the GSO affiliates, some qualm of risk, then they have 196 million dollars at issue, or 165 million dollars at issue, and there is at least the possibility that it survives summary judgment, and now I am a great big hedge fund as a defendant in a court in this environment, I might put some money on that risk. I might.

THE COURT: Okay. Why don't you wrap it up.

MR. STEPHENSON: At the end of the day, Judge, all we want, simply, is for a court of competent jurisdiction to consider the evidence and to reach a legal conclusion about whether we are the beneficial owner of the 6.3 million dollars, and if we are, permit us to trace it for the reasons that are set out in our papers and that our chart demonstrates, because

it is plainly traceable. And under the law and Your Honor's decision in Schick -- and I appreciated in Schick II, as I referred to it, where you observed in footnote 9 that a party exactly in the Gardi parties' circumstance, not the bank who's seeking to use as a shield the fact that the trustee lacks standing, you're absolutely right, that's an inappropriate use of that argument.

But in your footnote 9, you recognized, as we do, that where you're the beneficial owner, you absolutely have a right to go after the third party. Don't bar that claim from us, Judge. Please let us present our facts and let us make the legal argument, so that a court of competent jurisdiction can adjudicate the issue of who is the holder of the 6.3 million dollars. And then let us recover it. It's right, it's equitable. And we respectfully submit, it's the thing that this Court should do to address my client's interest, both under the motion to lift stay and with respect to our objections to the GSO settlement.

THE COURT: Okay. Thank you.

Anybody else who wants to be heard?

MR. SHORE: Your Honor, Chris Shore from White & Case for the GSO party.

I'd like to clarify first the arrangement we made with the creditors' committee. The creditors' committee was the only party who sought any discovery from us. They sought it

informally, and we shared documents that we've shared with the U.S. Attorney's Office, in their determination -- that they used in determining that we were also a victim of fraud.

The deal that is arranged is if the approval order is entered as it was submitted, today, and it goes final, GSO will remove or withdraw its replacement claim as set forth in paragraph 6 of the agreement. The point though is that it ends today. GSO is not willing to be incrementalized over time. So as long as it all goes final, the 502(h) claim is out.

Other than that, obviously, GSO has a lot of thinking on this issue, has explanations for a lot of this. But we recognize that our point of view in this process is probably the least relevant to the Court as far as determining the reasonableness of the settlement.

So I'm happy to answer any questions you have, but.

THE COURT: Yes. I just have a question about the proposed bar, which is in the settlement agreement. It basically says that the bar will enjoin any and all creditors, parties-in-interest and any person or entity that files a proof of claim. Does a creditor and a party-in-interest also have to file a proof of claim to be barred?

MR. SHORE: No, they would be a party who would meet the definition of a creditor under Section --

THE COURT: So whether or not they file a proof of claim they're barred. Okay.

MR. SHORE: If they are, in fact, in a creditor relationship with Dreier LLP or Mr. Dreier, their claims for the loss are going to be channeled through this process and through the bankruptcy case.

THE COURT: Okay. Thank you. Here's what I propose to do. Is there anybody who wants to -- not necessarily this second -- but wants to examine the trustee under oath? I would accept her statement or affidavit or declaration that I received yesterday as her direct testimony. Is there anybody who wants an opportunity to cross examine the trustee?

Hearing no response, I'll reserve decision. Thank you very much.

(Proceedings concluded at 11:40 a.m.)

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

Penina Wolicki

Digitally signed by Penina Wolicki
DN: cn=Penina Wolicki, c=US
Reason: I am the author of this document
Date: 2010.02.04 10:34:27 -05'00'

Penina Wolicki

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: February 4, 2010